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IN THE
Supreme Court of the United States

OCTOBER TERM, 1979

NO. _____

AD HOC COMMITTEE TO INVESTIGATE
THE FEDERAL GRAND JURY,
Petitioner

v.

HARRY KOCH, ASSISTANT
UNITED STATES ATTORNEY,
Respondent

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FIFTH JUDICIAL CIRCUIT**

OF COUNSEL

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TOPICAL INDEX

	Page
Opinion Below	2
Jurisdiction	2
Question Presented	2
Constitutional Provision Involved	2
Statement of Facts	2
Reasons for Granting the Writ	3
<p style="margin: 0;">A suit against an Assistant United States Attorney cannot be dismissed on the basis of immunity when jurisdiction has been asserted pursuant to treaties of the United States that provide for liability of Public Officials who commit acts in violation of such treaties in the course of their duties.</p>	
Conclusion	7

INDEX TO APPENDICES

Appendix A—Order of District Court	9
Appendix B—Order of Fifth Circuit Court of Appeals ...	11
Appendix C—Article VI, United States Constitution	12

TABLE OF AUTHORITIES CITED

CASES	Page
<i>Foster v. Neilson</i> , 2 Pet. 253	6
<i>Head Money Cases</i> , 112 U.S. 580	6
<i>United States v. Schooner Peggy</i> , 1 Cranch 103, 109	6
<i>Whitney v. Robertson</i> , 124 U.S. 190	6

UNITED STATES CONSTITUTION

Article VI	2, 3, 4, 6, 12
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II

TREATIES

	Page
Charter of the International Military Tribunal	3, 4
American Declaration of the Rights and Duties of Man ...	3, 5
American Convention on Human Rights	3, 5

TEXTS AND TREATISES

Y.I.L.C., II, (1951)	7
<i>Implementation of International Obligations</i>	7
<i>Research in International Law</i> III, Law of Treaties A.J.I.L. (1935, Harvard Law School)	7
<i>Washington, Letters to, MSS CXVII</i>	5

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HARRY KOCH, ASSISTANT
UNITED STATES ATTORNEY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH JUDICIAL CIRCUIT

Petitioner respectfully requests that a writ of certiorari issue to review the Judgment of the Court of Appeals for the Fifth Circuit entered August 16, 1979, which affirmed the decision of the United States District Court for the Northern District of Texas, Dallas Division. The decision of the District Court is attached hereto at Appendix "A".

OPINION BELOW

The Fifth Circuit Court of Appeals, by its judgment affirmed the decision of the District Court, a copy of said judgment being attached hereto at Appendix "B".

JURISDICTION

Jurisdiction of the United States Supreme Court is invoked pursuant to Title 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether a suit against an Assistant United States Attorney can be dismissed on the basis of immunity when jurisdiction for the matter has been asserted pursuant to treaties of the United States that provide for the liability of public officials who commit acts in violation of such treaties in the course of their duties?

CONSTITUTIONAL PROVISIONS INVOLVED

The applicable provisions of Article VI of the United States Constitution are set forth at Appendix "C".

STATEMENT OF FACTS

This Action was brought in the United States District Court against Harry Koch an assistant United States Attorney in Dallas, Texas for certain acts violative of the fundamental rights of a Defendant, Reynaldo Tamez, an ethnic minority, and upon his Affidavit of events that occurred in Criminal Number 3-78-76 in the Dallas Division. The acts complained of were that Defendant Koch prosecuted the matter due to his desire to force Tamez to sell his business and property at a loss, that he prosecuted the matter in bad faith for or on behalf

of an organized contraband group, and that he interfered with the counsel of Tamez. Jurisdiction was invoked pursuant to Article VI of the United States Constitution, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, the Charter of the International Military Tribunal, Nurnberg, its judgment and various other documents germane to the topic. In addition, violations of the First, Fifth, Sixth, Seventh, Ninth and Fourteenth Amendments to the United States Constitution were alleged and asserted.

In its order dated January 30, 1979, the Court admitted the acts complained of as follows:

"It is unnecessary to consider whether a claim has been stated. The suit must be dismissed for the reason that it is apparent on the face of the complaint that the acts complained of were committed by Koch in the course of his duties as prosecutor, and, consequently, he is immune from liability."
(emphasis supplied)

The Court then granted Defendant Koch's Motion to Dismiss.

REASONS FOR GRANTING THE WRIT

A SUIT AGAINST AN ASSISTANT UNITED STATES ATTORNEY CANNOT BE DISMISSED ON THE BASIS OF IMMUNITY WHEN JURISDICTION FOR THE MATTER HAS BEEN ASSERTED PURSUANT TO TREATIES OF THE UNITED STATES THAT PROVIDE FOR THE LIABILITY OF PUBLIC OFFICIALS WHO COMMIT ACTS IN VIOLATION OF SUCH TREATIES IN THE COURSE OF THEIR DUTIES.

Article VI of the United States Constitution provides:

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding."

By United Nations General Assembly resolution 2391 (XXIII) of 26 November 1968, it was declared that the Statutory Limitations to War Crimes and Crimes Against Humanity were held to be Non-Applicable regarding Resolution of the General Assembly of the United Nations 3(I) dated 13 February 1946 and 170(II) of 31 October 1947 on the Extradition and punishment of war criminals, resolution 95(I) of 11 December 1946 affirming the principles of international law recognized by the Charter of the International Military Tribunal, Nurnberg, and the judgment of the Tribunal, and resolutions 2184(XXI) of 12 December 1966 and 2202(XXI) of 16 December 1966 *which expressly condemned as crimes against humanity the violation of the economic and political rights of the indigenous population on the one hand and the policies of apartheid on the other. Further, the resolutions of the Economic and Social Council of the United Nations 1074 D(XXXIX) of 28 July 1965 and 1158(XLI) of 5 August 1966 on the punishment of war criminals and of persons who have committed crimes against humanity, included acts committed in time of war or in time of peace per the Charter of the International Military Tribunal, even if such acts do not constitute a violation of the domestic law of the country in which they were committed.* (emphasis supplied)

In Bogota, 1948, the United States became a contracting party to the American Declaration of the Rights and Duties of Man. Article XVIII thereto states, "Every person may resort to the Courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure *whereby the courts will protect him from acts of authority* that, to his prejudice, violate any fundamental constitutional rights." (emphasis supplied)

On June 1, 1977, President Jimmy Carter affixed his signature on behalf of the United States to the American Convention on Human Rights. Article 25 thereof states, "Everyone has the right to simple and prompt recourse, or any other effective recourse to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, *even though such violation may have been committed by persons acting in the course of their official duties.*" (emphasis supplied)

During the debate in the House of Representatives on the Jay Treaty, Chief Justice Ellsworth, in a written opinion communicated to Jonathan Trumbull, March 13, 1796, said:

"The instant the President and Senate have made a Treaty, the Constitution makes it a law of the land; and of course, all persons and bodies in whatever station or department within the jurisdiction of the United States are bound to conform their actions and proceedings to it. Such a treaty ipso facto repeals all existing laws so far as they interfere with it." MSS. *Letters to Washington*, CXVII, 287.

Chief Justice Marshall, in 1801, in the case of *United States v. Schooner Peggy*, 1 Cranch 103, 109, declared that a treaty under the Constitution of the United States became upon its conclusion the law of the land, as much to be regarded by the courts as an act of Congress, and as such affected the rights of parties litigating.

In 1829, just forty years after the Constitution went into operation, the same great judge, after noting the contractual nature of a treaty and its usual dependence for infra-territorial operation upon subsequent acts of the respective parties, said:

"In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision." *Foster v. Neilson*, 2 Pet. 253.

Although a treaty is primarily a contract between nations, it operates by virtue of Article VI of the Constitution as a municipal law and so far as it prescribes a rule by which rights of individuals under it may be determined the courts look to the treaty as they would to a statute for a rule of decision. *Head Money Cases*, 112 U.S. 580; *Whitney v. Robertson*, 124 U.S. 190.

When a duly authorized agent of a nation affixes his signature to a treaty on behalf of a nation, his act is not merely a simple formality. It creates an obligation on that nation to not act as if the treaty had never been signed. It is a further certification that ratification *will* occur (not that it *may* occur), and during the interim,

the nation will not commit any acts that would render the treaty useless, or interfere with its ratification or deny execution of the treaty once it is ratified. *Research in International Law III*, Law of Treaties, A.J.I.L. (1935, Harvard Law School), Supplement 635.

Hence, the signature of the duly authorized agent creates a legal obligation for the nation through his ex officio capacity (by virtue of his office), as well as a legal obligation for the individual agencies and departments of its government. *Implementation of International Obligations*, p. 48.

The basis for the strict obedience to the treaty text is explained as follows:

"The treaty is the result of a painfully acquired compromise to which some States rally, often with reluctance and at the cost of important concessions, in order to secure the participation of other States. But if these other States are subsequently at liberty to treat their signature as implying no obligation whatsoever, the concessions made by other signatories will have been made in vain seeing that the consideration which they could legitimately expect will not be forthcoming." II *Y.I.L.C.* (1951) p. 73.

CONCLUSION

Therefore, the courts below have erred in their reliance upon theories of immunity to dismiss this matter when jurisdiction for the matter has been asserted pursuant to treaties of the United States that provide for the liability of public officials who commit acts in violation of such treaties in the course of their duties. Hence, Peti-

tioner requests that the Petition for Writ of Certiorari in this matter be granted.

Respectfully submitted,

*Ad Hoc Committee to Investigate
The Federal Grand Jury*

DR. WILLIAM R. PABST, Chairman
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1434 West Alabama Street
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(214) 391-6133

Dated: October 15, 1979

Service of the within and receipt of a copy thereof is hereby admitted this ____ day of October, AD, 1979.

APPENDIX "A"

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA-3-78-1397-G

AD HOC COMMITTEE TO INVESTIGATE
THE FEDERAL GRAND JURY

v.

HARRY KOCH

ORDER

(Filed January 30, 1979)

The Ad Hoc Committee to Investigate the Federal Grand Jury filed suit on November 13, 1978 against Harry Koch, Assistant United States Attorney for the Northern District of Texas, alleging that Koch prosecuted a criminal case against Reynaldo Tamez in order to force Tamez to sell his business at a loss, to discourage "a rival controlled substance contraband group from doing business," and that Koch has improperly interfered with counsel for Tamez. The Committee seeks to enjoin Koch from communicating with the representative of Tamez, and to recover \$30 million in actual and punitive dam-

ages as well as \$250. Additionally, the Committee asks this court to fine defendant Koch \$250 pursuant to 18 U.S.C. § 3162 (1976) and to recommend to the State Bar of Texas that Koch be disbarred.

It is unnecessary to consider whether a claim has been stated. The suit must be dismissed for the reason that it is apparent on the face of the complaint that the acts complained of were committed by Koch in the course of his duties as prosecutor, and, consequently, he is immune from liability. *Yaselli v. Goff*, 12 F.2d 396 (2nd Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927). *See also Imbler v. Pachtman*, 424 U.S. 409 (1975). The defendant's motion to dismiss is GRANTED.

/s/ PAT E. HIGGINBOTHAM
Patrick E. Higginbotham
United States District Judge

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 79-1643

Summary Calendar*

AD HOC COMMITTEE TO INVESTIGATE
THE FEDERAL GRAND JURY,
Plaintiff-Appellant,

versus

HARRY KOCH,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

(AUGUST 16, 1979)

Before CLARK, GEE and HILL, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.¹
Imbler v. Pachtman, 424 U.S. 409 (1976).

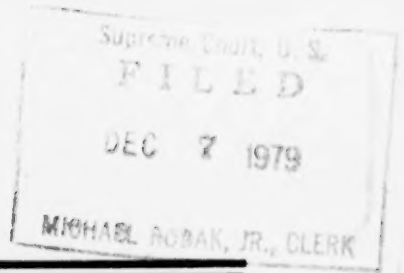
* Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

1. See *N.L.R.B. v. Amalgamated Clothing Workers of America*, 5 Cir. 1970, 430 F.2d 966.

APPENDIX "C"**Article VI of the United States Constitution:**

"This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

No. 79-657



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OCTOBER TERM, 1979

AD HOC COMMITTEE TO INVESTIGATE
THE FEDERAL GRAND JURY, PETITIONER

v.

HARRY KOCH

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

**MEMORANDUM FOR THE RESPONDENT
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-657

AD HOC COMMITTEE TO INVESTIGATE
THE FEDERAL GRAND JURY, PETITIONER

v.

HARRY KOCH

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT
IN OPPOSITION

Petitioner filed this \$30 million damages suit against respondent, an Assistant United States Attorney, alleging that respondent had engaged in improper conduct in the course of a criminal trial. Petitioner claimed that the prosecutor had "prosecuted the matter due to his desire to force [the defendant] to sell his business and property at a loss, that he prosecuted the matter in bad faith * * * and that he interfered with the counsel of [the defendant]" (Pet. 2-3). Relying on *Imbler v. Pachtman*, 424 U.S. 409 (1976), and *Yaselli v. Goff*, 12 F. 2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927), the United States District Court for the Northern District of Texas dismissed the complaint (Pet. App. A). The court of appeals affirmed without opinion (Pet. App. B).

In *Imbler v. Pachtman*, *supra*, 424 U.S. at 430, this Court held that prosecutors are absolutely immune from suits alleging constitutional violations based on activities that are "intimately associated with the judicial phase of the criminal process * * *." Petitioner's contention that certain international agreements abrogate this immunity is without merit. With the exception of the American Convention on Human Rights, 78 Dep't State Bull. 28 (July 4, 1977), the agreements cited by petitioner (Pet. 4-5) are not treaties and are not judicially enforceable. The American Convention on Human Rights, while it is a treaty, is not self-executing, and confers no judicially enforceable rights. Cf. *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829). In any event, no provision in any of the cited agreements purports to abrogate a prosecutor's absolute immunity from damage suits.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.
Solicitor General

DECEMBER 1979